

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD  
DIVISION OF JUDGES  
NEW YORK BRANCH OFFICE**

**TLC HEALTH NETWORK D/B/A LAKE  
SHORE HEALTH CENTER, DEBTOR-IN-POSSESSION**

**and**

**Case No. 03-CA-113937**

**1199 SEIU UNITED HEALTHCARE  
WORKERS EAST**

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for the General Counsel.  
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**DECISION**

**Statement of the Case**

**STEVEN DAVIS, Administrative Law Judge:**

This case presents the conflict between two important and unquestionable rights: the right of a worker, even though she is a statutory supervisor,<sup>1</sup> to vote in a Board-conducted election, and the right of an employer to demand that its supervisor follow its orders. Because I find that the right to vote must prevail, I conclude that supervisor Anna Galofaro was unlawfully discharged for voting in a Board election.

Based on a charge filed on September 24, 2013 by 1199 SEIU United Healthcare Workers East (Union), a complaint was issued against TLC Health Network d/b/a Lake Shore Health Center (Respondent) on April 7, 2014.<sup>2</sup>

The complaint alleges that in violation of Section 8(a)(1) and (4) of the Act, the Respondent discharged Anna Galofaro, a supervisor, because she voted in a Board-supervised election in which her supervisory status was at issue.

The Respondent's answer denied the material allegations of the complaint, and on July 22, 2014, a hearing was held before me in Buffalo, New York. On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following:

**Findings of Fact**

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<sup>1</sup> Hereafter, the use of the term "supervisor" shall mean a statutory supervisor as set forth in Section 2(11) of the Act.

<sup>2</sup> At the hearing, the complaint was amended to change the name of the Respondent to TLC Health Care Network d/b/a Lake Shore Health Care Center, Debtor-in-Possession.

## I. Jurisdiction and Labor Organization Status

The Respondent, a not-for-profit corporation, having an office and place of business in Irving, New York, has been engaged in the operation of an acute-care hospital. Annually, the Respondent in conducting its business operations, derives gross revenues in excess of \$250,000 and purchases and receives at its Irving, New York facility, goods valued in excess of \$5,000 directly from points outside New York State. The Respondent admits and I find that it is an employer engaged in commerce within the meaning of Section 2(2), (6) and (7) of the Act.

The Respondent also admits and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

## II. The Alleged Unfair Labor Practices

### A. Summary of the Facts

The essentially undisputed facts may be summarized as follows: Galofaro, a supervisor, believed that she was eligible to vote based on advice from Union agents that they believed that she was not a supervisor. Galofaro was told by her manager that, as a supervisor, she was not eligible to vote and could not vote. She was also told not to enter the voting room because doing so may prompt an election objection or an unfair labor practice charge.

Galofaro protested that she believed that she was eligible to vote. She rejected her manager's statement of her ineligibility based on the Union's advice that she was eligible and because she believed that her manager did not know what he was talking about. She further ignored her manager's advice that if she had any questions about her eligibility she should speak with the director of employee relations. She declined to do so because she believed that the Union agents had sufficiently answered her questions about her eligibility.

Galofaro voted, dismissing her manager's direction not to vote, and disregarding the signs in the voting room which stated that managers could not be in that area. She cast a challenged ballot because her name was not on the eligibility list. Immediately following the election, following the production of documentary proof that she possessed and exercised supervisory authority, the parties agreed that her ballot should not be counted.

Galofaro was discharged for insubordination – failing to obey her manager's orders not to vote and not to enter the voting room.

### B. Galofaro's Understanding of her Eligibility to Vote

Anna Galofaro was employed for 10 years. For the last four years she held the position of "dietary supervisor." The complaint alleges and the parties agree that as a dietary supervisor she has been a statutory supervisor.

In about February, 2013, the Union began a campaign to organize a unit of service and maintenance employees, including dietary aides, of the Respondent. In the following month, Sandy Harmon, a Union organizer, phoned all the employees who worked in the dietary department, including Galofaro.

Harmon met with Galofaro in March. They spoke about working conditions and how representation by the Union would benefit the employees. Harmon stated that she asked

questions concerning Galofaro's duties in order to "rule out" that she possessed supervisory responsibilities.

Although Harmon stated that Galofaro did not raise the issue of her supervisory status, and she did not ask her title, Harmon asked about her managerial duties – hiring, firing, and setting schedules. Harmon spoke with other dietary workers who did not refer to Galofaro as a supervisor, and she did not become concerned about Galofaro's status as a supervisor.

Harmon explained the election process to Galofaro, including that the parties have a right to challenge a voter, who then votes, and it is later decided whether her vote will be counted.

Galofaro's version of her meeting with Harmon was essentially similar. Harmon asked her to describe her duties. She did so, and mentioned her title. Harmon explained the election process in greater detail. Harmon said that she was not certain whether Galofaro would be affected by the election because of her title as supervisor but that she would check into it.

Harmon checked and then asked Galofaro, without giving a "complete legal description" of a supervisor's authority, whether she could hire or fire employees. Galofaro said she did not have that authority. Harmon replied that her responsibilities were more like a "lead position" than a supervisor – that her responsibilities did not "fulfill ... all the qualifications of a supervisor" – and that her status in the Union would not be affected. Galofaro testified that, after that conversation, she believed that she was eligible to vote.

### **C. Instructions by Management**

Galofaro stated that in June, Steve King, her direct supervisor and the director of nutrition services, and Dawn Weiskerger, his assistant, met with Galofaro and full-time supervisor Lela Parsell and head chef Gina Berringer. Two part-time supervisors were not present.

Amber Gould, a relief cook supervisor testified that she was present at the meeting with Galofaro and Parsell. It must be noted that, as set forth above, Galofaro stated that the part-time supervisors were not present and she did not identify Gould as being at the meeting. Gould stated that she worked five days a week, but only three as a supervisor. She denied that Berringer was at the meeting.

King did not testify. Galofaro testified that King told them that the Union was asking employees to vote for it in the upcoming election. He told them some facts about the Union including that it was not the same labor organization which represents employees at Brooks Hospital. He explained why the Respondent "didn't want the Union there." King said that "as supervisors, we were responsible for helping our department ... come to the right conclusion about the union and about the voting process.... He asked whether or not he could count on us to support TLC's position on the union." The three other supervisors answered or nodded affirmatively. Galofaro replied that she "wasn't sure I could do that."

Galofaro stated that at the meeting, King told those assembled that they were part of the supervisory team and that management expected them to support the Employer's position – to "uphold" the Respondent's "view on the election." She told him that she did not have enough information on the matter to say "100% yes or no on anything." She denied that King told her that the supervisors could not vote in the election. Rather, he said that they were "ineligible to vote" because the election did not affect them.

When King told the three women that they were not eligible to vote in the election. Galofaro asked “are you sure about that, because I was told that we were.” King replied “no, it doesn’t affect you guys, so you’re not eligible to vote in it. It doesn’t concern you, so you’re not eligible to vote.” The supervisors also agreed that in support of the Employer’s position they should inform the workers when meetings were held so that they could attend, obtain information and become informed voters. King said that that type of support for the Employer was sufficient.

Gould, called to testify by the Respondent, stated that at the meeting, King told the supervisors that they were not allowed to vote in the election, they should stay out of the polling place, and that if they voted, they could be terminated. She quoted Galofaro as asking why she could not vote, and King answering that the election “had nothing to do with the supervisors” and they were “not part of the election so it didn’t pertain to us.” He said that if they had any questions they could ask him or Tracie Luther, the director of employee and labor relations. Gould did not vote in the election.

King asked to meet with Galofaro privately. At their private meeting, King told Galofaro that if she did not believe that she could support the Employer’s position she would be “asked to step down as dietary supervisor.” Galofaro became upset and asked him to clarify what he meant by “supporting TLC’s position on the union,” asking him whether she had to tell an employee how to vote, because she did not want to give her opinion and tell a worker how to vote. King answered she did not have to do that; he simply wanted her to tell employees, if they asked, that TLC’s position is that it did not want a union. Galofaro agreed to do that.

King advised Galofaro that if she had any questions she could ask Luther. Galofaro did not speak with Luther because her questions were answered to her satisfaction by Harmon.

#### **D. Galofaro’s Later Conversation with Harmon**

Galofaro spoke with Harmon again. She told Harmon that King was wrong in telling the workers that the Union did not represent the employees at Brooks Hospital since Galofaro’s mother, who works there, confirmed that the Union represents certain employees at that hospital.

In their conversation, Harmon confirmed that Galofaro was eligible to vote. Galofaro testified that she asked Harmon to double and triple check that advice since King told her that she was not eligible.

Harmon agreed to again check whether Galofaro was eligible to vote, adding that it was “more likely” that her vote would be challenged. She explained the challenge ballot procedure – that her challenged ballot would be counted after the other ballots were counted.

Harmon testified that she believed that management personnel could not vote in Board elections but that supervisors are permitted to vote.

Harmon called Galofaro within one week, advising her that she was eligible to vote, but she would vote subject to challenge. Galofaro believed that that advice was “sufficient,” and asked Harmon if she needed to check anything else, and Harmon said she did not, unless she had any other questions. Galofaro further testified that she was told by two other Union agents that her duties were more like a lead person than a supervisor, and that she would be able to vote subject to challenge. She asked a union agent whether she should speak to the human

resources department about the matter but she said that it was not necessary.

### **E. The Election and Galofaro's Discharge**

5 On August 29, an election was held in a unit of service and maintenance and clerical employees, including dietary aides, and excluding supervisors as defined in the Act. The voting was conducted in three shifts: 6:00 a.m. – 8:00 am; 11:30 a.m. – 3:00 p.m., and 5:00 p.m. – 8:00 p.m.<sup>3</sup>

10 Galofaro arrived at work at 11:30 a.m. for her 12:00 noon shift. She entered the voting area at 11:30 a.m. wearing her hospital badge identifying her as a supervisor, and approached the voting table. She saw signs posted in the voting room stating “no management in the area.” She believed that “management” referred to managers such as King, and therefore did not apply to her.

15 She was told that her name was not on the eligibility list and she cast a challenged ballot. She then reported to King's office where King's assistant, Weiskerger showed her an email message and asked her to sign it.

20 The message, sent at 6:10 a.m. that morning by Luther and bearing the subject “Union Vote – Poling Area – Important” was addressed to the managers. It read as follows:

25 Managers – please be advised that due to today's Union Vote, Managers and Supervisors must remain out of the Credit Union/SNF Activities Room Corridor during polling hours. Consequences of non-compliance may lead to an Unfair Labor Practice Charge by the union, which can gravely alter the election. You may utilize the counselor hallway of IRRS to get to and from the main hospital, not the living area, or you can utilize the outside entrances.

30 You can visit the credit union when polls are not in session from 8:35 am – 11:15 am and 3:05 pm – 4:00 pm. Managers, please be sure to notify your supervisors. Also, please make sure that staff within your department that are considered part of the bargaining unit have an opportunity to vote and remind them of hours of polling in the SNF Activities Room ....

35 Galofaro told Weiskerger that she could not sign the message because she had already voted. Weiskerger asked “didn't you know that you weren't supposed to be voting?” Galofaro replied that she was just given that notice, and asked why she was not given the notice earlier in the week. Weiskerger said she just received the email. Galofaro went to her work area.

40 At the end of the election, the Employer and Union took up the issue of whether the challenged ballots, including Galofaro's ballot, should be opened and counted. The Employer asserted that she was a supervisor. The Union objected and asked for evidence of her supervisory status. The Employer produced disciplinary forms signed by Galofaro and it was agreed by both parties that her ballot should not be counted.

50 <sup>3</sup> Counsel for the General Counsel represented that an election in a unit of skilled maintenance employees was held on September 6. Luther did not recall the date of that election.

The Tally of Ballots showed that of the 106 eligible voters, 52 votes were cast for the Union, and 33 against it. There were 3 challenged ballots. There was no evidence that objections to the election were filed by any party, or that a charge was filed relating to the election.

The following day, Galofaro reported to work and was asked to meet with King and Luther. Galofaro testified that Luther asked her whether she voted the day before and Galofaro admitted doing so. Luther asked her why she “ignored the signs that were in the area.” Galofaro replied that she did not ignore them; she did not “realize that they applied to me” as they referred to “management.” Luther asked “did you know that you weren’t supposed to be voting in the union election?” Galofaro said that she did not know, and that she had been told that she was “eligible, that I was voting under the challenged vote.” Luther asked her who gave her that advice. Galofaro said that union representatives explained the challenged voting procedure, and “that’s the way I was told to vote.” Luther said that “that was wrong,” that she should not have voted and that she was not allowed to vote. Galofaro protested that she was not aware of that.

Luther pressed on, asking whether she met with King before the election, and didn’t he tell her that she could not vote? Galofaro denied that King said that she could not vote; he simply said that she was not eligible to vote. She also noted that King seemed to be “confused on some of his details” since he said that the Union did not represent the Brooks Hospital employees. She concluded from this misstatement, and his remark that she was ineligible when the Union agents said she was, and his “fumbling over his words” that she could not trust what he was saying, that he “really [didn’t] know what he was talking about,” and that is why she “confirmed with the union reps.”

Galofaro further testified that Luther told her that she should not have confirmed her status with the union agents – that she should have asked her. Galofaro admitted to Luther that King told her to bring any questions to Luther but she had already asked the Union agent to check on her eligibility and she did, and told Galofaro that she was eligible to vote. Accordingly, Galofaro believed that her questions were “sufficiently answered” by the Union agents, so it was unnecessary to consult with Luther.

Luther asked her to write an explanation as to why she voted, and the details of her conversation with the Union agents. Upon receiving the memo, Luther told her that she was suspended without pay until further notice.

Galofaro protested that she was told by the Union that she was eligible to vote because she was a lead person with no authority to hire or fire, and therefore would vote under challenge. She also asked why she was not told to leave the voting area if she was not permitted to be there. Luther said that the Employer could not tell her not to vote if she was already in the voting area. Galofaro continued to argue, saying that she did not receive anything in writing which stated that she could not vote, and was not told that she would be disciplined if she voted. She asked why she was not given the email message to sign before the day of the vote, adding that if she read it before she voted it would have raised a question in her mind and she would have spoken to someone.

About one week later, at the Respondent’s request, Galofaro met with King and Luther. Luther told her that she was not eligible to vote, she was not allowed to vote, and because she was told by King before the election that she could not vote, she had therefore “directly disobeyed King’s directives to not vote and was insubordinate.” Luther told her that she was

fired. Galofaro protested that she did not intend to disobey or ignore King's instructions. Rather, she was not told that she would be fired for voting. Nor was she told that she could not vote.

Galofaro stated that she encouraged two other supervisors to vote in the election despite being told by King what the Employer's position was concerning their voting. The other supervisors did not vote.

The discharge letter dated September 6 signed by King, stated in relevant part as follows:

At a meeting on August 7, with Nutritional Services supervisors, I explained that as supervisors they were ineligible to vote in an upcoming union election. You were in attendance at that meeting. At that time, I shared with you my expectations of you as a supervisor, including that in your role you must be supportive of the organization's position during the pending union campaign. Subsequently, you had some questions of me. I personally met with you after the meeting to further explain my own and the organization's expectations of you as supervisor. When you raised the question of your own eligibility to vote, I informed you again that you were ineligible and also informed you that if you had further questions as to your eligibility to vote, that you should contact Tracie Luther, Vice President of Human Resources. At that time, you indicated that you understood what was expected.

On the days prior to the election I again reminded you and the supervisors of my own and the organizations' expectations of you as a supervisor, and your ineligibility to vote.

On August 29, the day of the election, notice was posted in the election area that no managers were allowed in the polling area during the election process. Despite these signs, the clear explanation of your status as a supervisor, clear expectation given by me of your behavior during the election and your ineligibility to participate in the election you chose to appear at the polling area to vote as a service, maintenance and clerical unit employee. You wore your badge into the polling area which clearly identified you as a supervisor. Your ballot was challenged, and you were subsequently ruled ineligible to vote.

Ms. Luther and I met with you on August 30, to investigate this matter. You indicated that you chose to vote based on your conversation with union officials, which you initiated, and that you did not seek additional explanation from Ms. Luther as I instructed you to do. By choosing to vote against my instructions going into the polling area against instruction posted that you were not to do so, and by attempting to cast a vote in a union election though in a status as a supervisor, you directly disobeyed my instructions and in so doing undermined my own and the hospital's expectations of your behavior in the election and put the hospital at risk for an unfair labor practice.

Your actions are in violation of hospital policy – “an employee may be ... discharged for insubordination, including failing or refusing to follow a supervisor’s instructions....”

5               Based on the seriousness of your decisions to ignore my directives and to act in such a way that risked harm to the hospital by appearing at the election to vote, your employment at the [Employer] is terminated.

10             Luther testified that supervisors such as Galofaro were excluded from the voting unit and were ineligible to vote and should not vote in the election. She was concerned that the Employer would be subject to an unfair labor practice or an election objection if a supervisor voted, possibly causing the election to be set aside.

15             Luther stated that in her meeting with Galofaro she asked if Galofaro was told that she should not vote. Galofaro agreed but added that she did not believe King, and did not confirm her eligibility with Luther as she was advised since she “got the answer she needed from the Union.” She stated that in reaching the decision to discipline Galofaro she gave some weight to the fact that Galofaro had attempted to persuade other supervisors to vote. In fact, another  
20 supervisor told Harmon that Galofaro advised that she should vote,

              Luther stated that Galofaro was discharged for insubordination in that, as a supervisor, “if Mr. King had told her not to vote in the election, that if she were to vote in the election that would be insubordinate,” adding that “I just felt that that’s going against what your supervisor  
25 told you to do.” In reaching the decision Luther and King discussed the fact that King “was clear in his expectation that the supervisors not vote.”

              Luther explained that although the Employer has a progressive discipline policy, insubordination is such a serious violation that the lower steps in that policy were bypassed.  
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### Analysis and Discussion

              The complaint alleges that Galofaro was discharged for voting in a Board election in which her supervisory status was at issue. The Respondent argues that it did not discharge her  
35 for voting in the election. Rather, it fired her for insubordination – for failing to follow its order that she not vote.

              The evidence supports a finding that Galofaro was discharged for voting in the election. Even assuming that she was dismissed for insubordination in that regard, her disobedience was  
40 that she voted in the election. In either case, it is clear that she was fired for voting. She was told not to vote and she voted. She therefore was fired for voting in the election. Her discharge was inextricably intertwined with her exercise of her right to vote.

### A Supervisor’s Right to Vote

45             The right to vote in a Board-conducted election is inviolate. The Board has the “responsibility to assure employees the ‘fullest freedom’ in the exercise of their right to participate in a Board-conducted election. (National Labor Relations Act, Sec. 9(b).” *Magnum Transportation, Inc.*, 360 NLRB No. 129, slip op. at 1 (2014) (Member Miscimarra, concurring).

50             The protection of Section 7 of the Act includes the right to vote by secret ballot in a Board-conducted election. *Lawson Printers, Inc.*, 159 NLRB 771, 775 (1966). “Surely the act of



voting lies at the core of the Section 7 right....” *Concrete Form Walls, Inc.*, 346 NLRB 831, 839 (2006). As explained below, that Section 7 right applies to supervisors as well as employees.

Employees, including supervisors, have the right to present themselves at Board elections and vote. However, not all individuals have a right to have their ballots counted. For example, a supervisor may not have her ballot counted as she is ineligible to vote. Supervisors’ challenged ballots may or may not be counted, depending upon the parties’ agreement at the election, or in post-election proceedings if the ballot is determinative of the election.

The supervisor may mistakenly and wrongly believe that she is eligible to vote, as happened here. In any case, her vote may be challenged by the Board agent because her name is not on the eligibility list. Her vote may be challenged on the ground that she is ineligible to vote, but nonetheless she is permitted to vote without interference and without fear that she may be discharged for voting. Supervisors routinely vote subject to challenge. See *Frey Mechanical Contractors*, 270 NLRB 348, 352 (1984).

Indeed, the Board’s Representation Casehandling Manual states that the “challenge procedure provides a method whereby a voter’s eligibility to vote may be called into question, the ruling on the question may be at least temporarily reserved, and the questioned voter may memorialize his/her desires in the event these desires should have relevance in the future.... The Board agent must challenge anyone whose name is not on the eligibility list....” Sections 11338.2(b) and 113.338.3.

The essential point is that a supervisor may not be barred from entering the voting room by the Board agent or management. She has a right to cast a vote, even if challenged.

This case is different than the facts in *Animal Trap Company of America*, 107 NLRB 1193, 1194 (1954), where named supervisors were expressly excluded from an election by the Board in a pre-election Decision. Nevertheless, they voted subject to challenge. The employer argued that they should not have been permitted to vote. The Board refused to set aside the election, stating that “while it would have been better practice for the Board agent to refuse to permit them to vote, even under challenge, as the Board has already ruled on their eligibility, we do not consider the fact that they nevertheless were permitted to vote in itself sufficient ground for setting aside the election.”

Here, Galofaro was not expressly excluded from voting in a pre-election proceeding. She was included in the broad category of “supervisors” who were deemed ineligible to vote. However, she accordingly had a right to cast a challenged ballot.

#### **A Supervisor’s Protection Under Section 8(a)(4) of the Act**

Section 8(a)(4) of the Act states that it is an unfair labor practice for an employer to “discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act.” The Board’s approach to this provision “has been a liberal one in order to fully effectuate the section’s remedial purpose.” *General Services, Inc.*, 229 NLRB 940, 941 (1977), relying on *NLRB v. Scrivener*, 405 U.S. 117, 124 (1972).

The broad language contained in Section 8(a)(4) has been interpreted as being consistent with an intention to prevent the Board’s channels of information from being dried-up by employer intimidation of prospective complainants and witnesses.... The Board has consistently given an expansive scope to the

protections afforded by Section 8(a)(4), thereby conferring the crucial importance of that section to the effective operation of the National Labor Relations Act. The Supreme Court has approved of the Board's expansive interpretation of Section 8(a)(4) of the Act. Thus, the Board has found that Section 8(a)(4) protects not only employees, but supervisors.... *Power Systems, Inc.*, 239 NLRB 445, 447 (1978).

It is this background of the broad interpretation given Section 8(a)(4) against which I must analyze whether Galofaro's discharge violated the Act.

Supervisors are not protected by the Act because, pursuant to Section 2(3) of the Act, they are specifically excluded from the definition of "employee." However, the Board has held that supervisors are protected "when invoking or seeking to invoke the Board's processes." *SNE Enterprises*, 347 NLRB 472, 497 (2006) citing *Hi-Craft Clothing Co.*, 251 NLRB 1310 (1980); *General Services, Inc.*, 229 NLRB 940 (1977).

In *Hi-Craft Clothing Co.*, above, the admitted supervisor, unhappy at not receiving a bonus that he believed had been promised to him, advised his manager that he was "going to the Labor Board." When he repeated his intention to go to the Board, he was fired. The Board affirmed the administrative law judge's finding that the discharge violated Section 8(a)(4) of the Act, agreeing with the General Counsel's argument that there is a strong public policy favoring the free and unimpeded access to the Board's processes and, therefore, supervisors should also be protected when invoking, or seeking to invoke, the Board's processes. See also *Metro Networks*, 336 NLRB 63, 66 (2001).

In *General Services*, above, an individual was "unsure of his status as supervisor or employee" and filed a charge alleging that he was fired for engaging in union activity. The Board determined that he was a supervisor and dismissed the Section 8(a)(3) charge but held that he was discharged in violation of Section 8(a)(4) for filing the charge. The Board stated that the purpose of Section 8(a)(4) is to "assure an effective administration of the Act by providing immunity to those who initiate or assist the Board in proceedings under the Act." 229 NLRB at 941. The Board stated that the purpose of Section 8(a)(4) is to "protect from reprisal employees who file unfair labor practice charges and thus encourage them to report such allegations to the Board."

Similarly, here, as in *General Services*, Galofaro was uncertain of her supervisory status because of the conflicting opinions of the Union and her Employer. She may have been mistaken about her status, but nevertheless sought to use the Board's election processes to confirm her voting status. Section 8(a)(4) protected her as it protected the supervisor in *General Services* from discharge because she invoked the Board's processes for that purpose.

The fact that in *General Services* the supervisor filed a charge and here Galofaro voted in an election, does not require a different result. In each case the individual invoked the Board's processes - actions which involved the two central missions of the Board: preventing and remedying unfair labor practices and conducting elections to enable employees to vote for or against union representation.

Here, I find that Galofaro invoked the Board's processes by exercising her right to vote in the election. She believed that she was eligible to vote or at least eligible to cast a challenged ballot based on the Union's agents advising her that she was eligible and could cast such a ballot.

In fact, there was some uncertainty about Galofaro's eligibility, as demonstrated by the parties' conduct at the conclusion of the election. Union agent Harmon argued that Galofaro was not a supervisor and asked for proof of her supervisory status. Only when documents signed by Galofaro were produced establishing to the Union's satisfaction that she was a supervisor, was her ballot not opened and counted.

The Board has held that an employer "must refrain from discriminating against an individual for indicating an intent to go to the Board since it is the Board's function, and not the employer's, to decide whether the individual is covered by the Act and his claim has merit." *Hi-Craft*, above, at 1310, fn. 2. Here, Galofaro voted in the election to determine whether she was, in fact, eligible to vote. The Respondent violated the Act in discharging her for seeking such a determination.

It is true that supervisors may be discharged for engaging in union activity or for promoting a union. *Daniel Construction Co.*, 266 NLRB 1090, 1095-1096 (1983), cited by the Respondent. Here, the Respondent does not argue that Galofaro was discharged for such activity. Indeed, it is undisputed that she agreed to present the Employer's view that it did not wish that its employees be represented by the Union. There is nothing unlawful in that view and it was not unlawful for Galofaro to express that position to employees.

I accordingly find and conclude that the Respondent violated Section 8(a)(4) of the Act by discharging Galofaro for voting in the Board-conducted election.

### **The Respondent's Defenses**

The Respondent argues that Galofaro was not discharged for voting, but was fired for insubordination for failing to obey her supervisor's orders that she not vote or enter the voting room. An employer has an unquestioned right to discharge a supervisor for insubordination or disloyalty. *Parker-Robb Chevrolet, Inc.*, 262 NLRB 402, 404 (1982); *Ozark Motor Lines*, 164 NLRB 300 (1967).

However, an employer's right to discharge a supervisor for insubordination is not absolute. It has its limits. The Board has long held that the discharge of a supervisor for insubordinately refusing to follow his employer's order to engage in unfair labor practices violates the Act. *Belcher Towing Co.*, 238 NLRB 446, 447 (1978); *Russell Stover Candies*, 223 NLRB 592, 600 (1976); *Jackson Tile Mfg. Co.*, 122 NLRB 764, 767 (1958); *Vail Mfg. Co.*, 61 NLRB 1871, 182 (1945); *Richter's Bakery*, 46 NLRB 447, 450 (1942).

Similarly, here, the Respondent fired Galofaro for insubordinately refusing its order to refrain from voting. She was, effectively, discharged for voting.

"The maintenance of free access to the Board's process, and prohibiting interference therewith, is a duty reserved to the Board and is not to be delegated to the parties....*Local No. 453 Molders*, 208 NLRB 869, 872 (1974).

The Respondent argues that, by virtue of her appearance in the voting room, Galofaro subjected it to an unfair labor practice charge or an election objection. I can appreciate the Respondent's concern, but the Board has long held that "the mere appearance of a supervisor at the polls to vote without further incident is no basis for setting aside an election...." *Dixie Broadcasting Company*, 120 NLRB 869, 870 (1958); *Brown-Dunkin Company*, 118 NLRB 1603, 1604 (1957).

The Employer further argues that the purpose of a Board election is to enable employees to choose whether they desire to be represented by a labor organization, not to provide a forum for workers who seek a determination of their eligibility. The Respondent also asserts that Galofaro was ineligible to vote because it is undisputed that she was a supervisor, and she therefore she had no reason to vote.

The Respondent's arguments have merit. However, Galofaro voted, whether innocently, deliberately, or mistakenly believing the Union's advice that she was not a supervisor and that her ballot would be challenged. She could not lawfully be discharged for voting.

Indeed, when Galofaro asked Luther why she was not asked to leave the voting area if she could not vote, Luther replied that she could not interfere with her as she was already voting.

Luther was correct. The Respondent could not interfere with Galofaro as she was voting, nor could it discriminate against her because she voted. The Board clearly expressed its reasons for this policy in *Concrete Form Walls, Inc.*, above at 839, where it stated that "the act of voting lies at the core of the Section 7 right.... discharging an employee because she voted represents a full frontal assault on the right to vote at all."

A holding that an employer may discharge an employee, even a supervisor, for voting in a Board-conducted election, would have a detrimental effect on employees seeking to vote in such elections. Employees who believe that they are eligible to vote may refrain from voting for fear of being fired. In that case, the employer, and not the Board, would effectively decide the voting eligibility of the prospective voter.

In *Ozark*, above, the Board held that the supervisor's discharge for insubordination was not unlawful because his refusal to follow the employer's orders that he meet with its attorney and his refusal to sign a statement did not interfere with the rights of employees. Here, the Respondent's discharge of Galofaro for insubordination did interfere with the rights of employees to vote.

I accordingly find that the Respondent's discharge of Galofaro also constitutes a violation of Section 8(a)(1) of the Act.

### Conclusions of Law

1. By discharging its supervisor Anna Galofaro for voting in a Board-conducted election, the Respondent violated Section 8(a)(1) and Section 8(a)(4) of the Act.

2. The unfair labor practices set forth above are unfair labor practices affecting commerce within the meaning Section 2(6) and (7) of the Act.

### The Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent having discriminatorily discharged and refused to reinstate Anna Galofaro, it must offer her reinstatement to her former position or, if that position no longer

exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges she would have enjoyed absent the discrimination against her. Further, I shall recommend that the Respondent make her whole for any loss of earnings and other benefits suffered as a result of discrimination against her.

Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No 8 (2010), enf. denied on other grounds sub. nom. *Jackson Hospital Corp. v NLRB*, 647 F.3d 1137 (D.C. Cir. 2011). In accord with *Tortillas Dan Chavas*, 361 NLRB No.10 (2014), my recommended Order also requires the Respondent to (1) submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Galofaro, it will be allocated to the appropriate calendar quarters, and/or (2) reimburse her for any additional Federal and State income taxes she may be assessed as a consequence of receiving a lump-sum backpay award covering more than 1 calendar year.

In accordance with the Board's decision in *J. Piccini Flooring*, 356 NLRB No. 9, slip op. at 5-6 (2010), I shall recommend that the Respondent be required to distribute the attached notice to members and employees electronically, if it is customary for the Respondent to communicate with employees and members in that manner. Also in accordance with that decision, the question as to whether a particular type of electronic notice is appropriate should be resolved at the compliance stage. *J. Piccini Flooring*, above, slip op. at 3. See *Teamsters Local 25*, 358 NLRB No. 15 (2012).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>4</sup>

### ORDER

The Respondent, TLC Health Network d/b/a Lake Shore Health Care Center, Debtor-in-Possession, Irving New York, its officers, agents, successors, and assigns, shall

1. Cease and desist from:

(a) Discharging employees because they voted in a Board-conducted election.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Anna Galofaro full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Anna Galofaro whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of the

<sup>4</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

decision.

(c) Within 14 days from the date of the Board's Order, remove from its files any reference to the unlawful discharge, and within 3 days thereafter notify Anna Galofaro in writing that this has been done and that the discharge will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in Irving, New York, copies of the attached notice marked "Appendix."<sup>5</sup> Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since September 6, 2013.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. October 23, 2014

\_\_\_\_\_  
Steven Davis  
Administrative Law Judge

<sup>5</sup> If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the national Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

**APPENDIX**

**NOTICE TO EMPLOYEES**

Posted by Order of the  
National Labor Relations Board  
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

**FEDERAL LAW GIVES YOU THE RIGHT TO**

Form, join, or assist a union  
Choose representatives to bargain with us on your behalf  
Act together with other employees for your benefit and protection  
Choose not to engage in any of these protected activities

WE WILL NOT discharge employees because they voted in a Board-conducted election.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL within 14 days from the date of the Board's Order, offer Anna Galofaro full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Anna Galofaro whole for any loss of earnings and other benefits suffered as a result of the discrimination against her.

WE WILL within 14 days from the date of the Board's Order, remove from our files any reference to the Anna Galofaro's unlawful discharge, and within 3 days thereafter notify her in writing that this has been done and that the discharge will not be used against her in any way.

TLC HEALTH NETWORK d/b/a LAKE SHORE  
HEALTH CARE CENTER,  
DEBTOR-IN-POSSESSION

\_\_\_\_\_  
(Employer)

Dated \_\_\_\_\_ By \_\_\_\_\_  
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: [www.nlrb.gov](http://www.nlrb.gov).

130 S. Elmwood Avenue  
Suite 630  
Buffalo, New York 14202  
Hours: 8:30 a.m. to 5 p.m.  
716-551-4931.

The Administrative Law Judge's decision can be found at [www.nlrb.gov/case/03-CA-113937](http://www.nlrb.gov/case/03-CA-113937) or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE**

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 716-551-4946.